UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KENNETH C. YUNKER, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 97-62-P-DMC***
	)	
NORTHWESTERN NATIONAL LIFE INSURANCE CO., et al.,	***)***	
	)	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON CROSS-MOTIONS FOR JUDGMENT BASED ON A STIPULATED RECORD[1]

The plaintiffs, Kenneth C. Yunker and Colleen F. Yunker, husband and wife, and the defendants, Northwestern National Life Insurance Co. ("Northwestern"), Zurn Industries, Inc., and Zurn Industries, Inc. Health Plan (collectively, "Zurn"), have all moved for judgment on the basis of a stipulated record submitted by the parties in this declaratory judgment action. Any factual disputes may therefore be resolved by the court. *See Boston Five Cents Sav. Bank v. Secretary of Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985). For the reasons set forth below, I grant the defendants' motion.

I. Factual Background

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

Colleen Yunker was injured in a motor vehicle accident on September 7, 1993. Stipulations (Docket No. 17-1) ¶ 1. In the accident, the vehicle operated by Colleen Yunker was struck from behind by a vehicle owned by Janie Iverson and driven by Andrea Iverson. *Id.* ¶ 4; First Amended Complaint ¶ 8; Answer of Zurn ¶ 8; Answer of Northwestern ¶ 8. Zurn, the employer of Kenneth Yunker, paid for Colleen Yunker's post-accident medical bills pursuant to its Health Plan. *Id.* ¶ 8. Colleen Yunker's medical expenses subsequent to the accident exceed $150,000. *Id.* ¶ 3.

The Yunkers have brought a civil action in the Maine Superior Court (Cumberland County) against Janie Iverson and Andrea Iverson as a result of the accident. *Id.* ¶ 12. Andrea Iverson has admitted liability for the accident; Janie Iverson has not. *Id.* ¶ 13. Counsel for the Iversons has indicated that she will dispute certain medical expenses incurred by Colleen Yunker and paid for by Zurn as being not causally related to the accident, not necessary or appropriate, and unreasonably costly. Letter from Martica S. Douglas, Esq., to John H. Montgomery, Esq., dated October 23, 1996 (Exh. 7 to Stipulations). The psychologist retained by the defendants in the state court action does not dispute that Colleen Yunker has suffered chronic pain caused at least in part by the accident. Stipulations ¶ 14.

Zurn has asserted a first priority right to reimbursement for the medical expenses it has paid on behalf of Colleen Yunker from any judgment or settlement in the state court case, regardless of the basis for any such recovery or award, and without deduction for any portion of the attorney fees incurred in that action by the Yunkers. *Id.* ¶ 15. None of the defendants in this action has intervened in the state court action. Supplemental Stipulations (Docket No. 24) ¶ 2. Northwestern, or its corporate successor, provides administrative services to the Zurn Health Plan, but Zurn is the plan administrator. Administrative Services Only Agreement, part of Exh. 17 to Stipulations; Second Supplemental Stipulation (Docket No. 25) ¶ 1. The Zurn Health Plan is a self-insured health benefit plan under the

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Stipulations ¶ 9.

The plaintiffs filed this action on February 26, 1997. Docket No. 1. The operative complaint seeks a declaratory judgment that the defendants are not entitled to reimbursement for any medical expenses not shown or otherwise established in the state-court action to be causally related to the accident, or that the defendants have waived their right to reimbursement or are estopped to assert such a right by their failure to intervene in the state-court action; that the defendants are not entitled to share in the proceeds of any settlement of the state-court action if the settlement specifically excludes claims for any of the medical expenses incurred by Colleen Yunker; and that the defendants are required as a condition of their receipt of any reimbursement to pay a share of the attorney fees and costs incurred by the plaintiffs in the state-court action. First Amended Complaint (Docket No. 2) at 5. Zurn has asserted a counterclaim alleging its right to full recovery of all payments made on behalf of Colleen Yunker regardless of whether the plaintiffs seek or obtain recovery for such expenses in the state-court action. Answer, Affirmative Defenses and Counterclaim (Docket No. 3) at 8. Northwestern asserts in its answer that it is not a proper party to this action, Answer and Affirmative Defenses (Docket No. 5) at 4, and that claim is reasserted in the defendants' joint motion for judgment, Defendants' Motion for Judgment on the Record with Incorporated Memorandum of Law (Docket No. 18) at 14.

II. Legal Analysis

A. Defendant Northwestern

The plaintiffs do not respond to the defendants' argument concerning Northwestern, and it appears from the record that Northwestern has no stake in the controversy between the plaintiffs and Zurn. Therefore, the defendants' motion will be granted insofar as it seeks dismissal of Northwestern from this action.

B. Waiver

Relying on non-ERISA case law, primarily more than fifty years old, the plaintiffs argue that Zurn has waived its right to subrogation under the health plan because it failed to intervene in the state court action.[2] The relevant language of the plan provides:

> **Subrogation**
> If the Plan pays covered medical expenses for sickness or accidental injury caused in whole or in part by the act or omission of another, the Plan will have a right of subrogation against any person, any insurer, you or your covered dependent or any insurer of you or your covered dependent should you receive, or have a right to receive, any damages or payments.
>
> You or your covered dependent will do nothing to prejudice the Plan's subrogation rights and will cooperate with the Plan to protect such rights, including --
> • providing information,
> • signing an agreement documenting the Plan's subrogation rights, or
> • taking any other action the Plan requests, including execution, completion, and filing of any document deemed by the Plan necessary to protect its rights.
>
> The Plan's subrogation rights and amounts recoverable/recovered pursuant to such rights are a first priority claim. Such amounts will be reimbursed first even if all amounts recovered from whatever source are insufficient to compensate you or your covered dependent in part or whole for all damages sustained.
>
> At the option of the Plan, action may be taken to preserve the Plan's subrogation rights, including --
> • the right to bring any legal action in your or your covered dependent's name, or
> • seek reimbursement out of any amount from any source recovered by you or your covered dependent.
>
> Any settlement proceeds received by you, your covered dependent, or your attorney will be held in trust for the Plan's benefit. The Plan has no obligation to pay any attorney or other legal fees to your or your covered dependent's attorney for any subrogation recovery received. A representative of the Plan

[2] While the complaint raises a claim of estoppel as well as waiver in this context, the plaintiffs address only waiver in their motion and supporting memoranda. Accordingly, estoppel is no longer an issue before the court. *Thomas R. W. v. Massachusetts Dep't of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997).

> will have the right to intervene in any suit or proceeding to protect its subrogation rights.

Zurn Group Insurance Plan, Exh. 27 to Stipulations, at 50.

The most recent case law upon which the plaintiffs rely, *United States Fidelity & Guar. Co. v. Carl Subler Trucking, Inc.*, 800 F.2d 1540 (11th Cir. 1986), like the much older case law from the states of New York and Kansas that they cite, holds that an insurer may waive its contractual right to subrogation by failing to intervene in its insured's action against the tortfeasor, so long as the insurer has notice of the insured's action. *Id*. at 1542. However, that holding is based only on Georgia law. *Id.* The state case law is also based on state law. Reported Maine case law is silent on this point, and the plaintiffs point to no statutory provision that might be applicable.

In any event, Zurn argues that ERISA preempts state law on this point. In *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), the Supreme Court construed 29 U.S.C. § 1144(b)(2)(B), known as ERISA's "deemer clause," to exempt self-funded health benefit plans from state subrogation laws. *Id.* at 61. The deemer clause provides:

> Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title . . . , nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

29 U.S.C. § 1144(b)(2)(B). The Supreme Court read the deemer clause "to exempt self-funded ERISA plans from state laws that 'regulat[e] insurance.'" 498 U.S. at 61. "[S]elf-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plan." *Id.* The Supreme Court specifically rejected a construction of the deemer clause that would exempt such plans only from those state regulations that encroach upon core ERISA concerns or that apply to insurance as a business. *Id.*

at 65.

My research has unearthed no reported cases in which courts have addressed the issue of waiver as a result of failure by a self-funded ERISA plan to intervene in an insured's action seeking recovery from a tortfeasor, as distinct from those cases in which an ERISA plan is not involved. However, in two related cases, courts have relied on the deemer clause, and the Supreme Court's interpretation of it, in concluding that the doctrine of waiver, a creature of state law, does not apply. In *Electro-Mechanical Corp. v. Ogan*, 820 F. Supp. 346 (E. D. Tenn. 1992), *aff'd* 9 F.3d 445 (6th Cir. 1993), a case in which the plaintiffs sought to prevent recovery by an ERISA plan under the plan's subrogation provisions, the court, relying on *FMC Corp.*, held that "principles of equity and waiver cannot be utilized to defeat the subrogation contract in this cause." 820 F. Supp. at 350. In *Danowski v. United States*, 924 F. Supp. 661 (D. N. J. 1996), the court held that "[t]here is no reason why the plan must be a party to the suit in order for ERISA to protect the plan's right to reimbursement." *Id.* at 672. There, the defendant sought to invoke the state collateral-source rule to limit the plaintiff's recovery, but the court, noting that the self-funded ERISA plan that had paid for some of the plaintiff's medical treatment would be left with no fund against which to assert its claim for reimbursement if the recovery was so limited, cited *FMC Corp*. in concluding that the state collateral-source rule was preempted by ERISA, even though the plan was not a party to the action. *Id*. at 671-72.

The reasoning of these courts is persuasive. The case law upon which the plaintiffs rely does not involve ERISA, a vital distinction. *FMC Corp.* strongly suggests that ERISA preemption extends to an equitable claim of waiver interposed in opposition to an ERISA plan's attempt to enforce its written subrogation provisions. I conclude that Zurn is entitled to recover from any proceeds of the state court action obtained by the plaintiffs, pursuant to the subrogation language in its plan, all of the funds it has expended on behalf of Colleen Yunker to the extent that those funds were spent for care

and treatment related to injuries caused in whole or in part by the negligence of either or both of the defendants in the state court action.

C. Attorney Fees

The plaintiffs argue that the "common fund" doctrine, pursuant to which a person who recovers a common fund for the benefit of others as well as himself is entitled to a reasonable attorney fee from the common fund as a whole, entitles them to a reasonable charge against the reimbursement of Zurn from their recovery in the state action for the attorney fees and costs incurred in obtaining that recovery. They correctly point out that the Maine Law Court recently adopted the common-fund doctrine. *York Ins. Group of Maine v. Hall*, 1997 ME 230 (Me. Dec. 12, 1997), slip op. at 6 (doctrine available where insured incurs attorney fees and expenses in recovering judgment or settlement that benefits subrogated insurer). However, because the subrogated party in this case is an ERISA plan, the inquiry does not stop here.

The plaintiffs rely on *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir.), *cert. denied* 118 S.Ct. 562 (1997), in which the Seventh Circuit held that an Illinois common-fund statute is not preempted by ERISA. *Id*. at 496. The court noted, however, that "[a] plan might have a better argument if its governing documents expressly required participants to pay their own legal fees . . . and to remit the gross rather than net proceeds from litigation." *Id.* The Zurn plan does require participants to pay their own legal fees and to remit gross proceeds. Other circuits that have addressed this issue have upheld such plan language against state-law common-fund arguments. *Stillmunkes v. Hy-Vee Employee Benefit Plan & Trust*, 127 F.3d 767, 770 (8th Cir. 1997); *Ryan v. Federal Express Corp.*, 78 F.3d 123, 127-28 (3d Cir. 1996). *See also Member Servs. Life Ins. Co. v. American Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 957 (10th Cir. 1997) (holding that quasi-contractual remedies are not

to be created when ERISA plan expressly regulates the disputed issue); *Cagle v. Bruner*, 112 F.3d 1510, 1520-22 (11th Cir. 1997) (ERISA-plan subrogation not subject to state-law "make whole" doctrine if plan expressly provides plan with right to first recovery).

Federal courts may not apply common-law theories to alter the express terms of written ERISA plans. *E.g., Bollman Hat Co. v. Root*, 112 F.3d 113, 116 (3d Cir.), *cert. denied* 118 S.Ct. 373 (1997); *Cinelli v. Security Pacific Corp*., 61 F.3d 1437, 1444-45 (9th Cir. 1995). This general principle, as well as the specific holdings of the Third, Seventh and Eighth Circuits discussed above, supports the defendants' position on this issue. While the result may seem harsh, the plaintiffs offer only equitable arguments to overcome the prevailing legal standard. The language of the Zurn plan is specific; it must control.[3] The plaintiffs are not entitled to recover attorney fees from Zurn or to deduct any portion of the attorney fees and costs incurred in the state-court action from the reimbursement due to Zurn under the plan.

IV. Conclusion

For the foregoing reasons, judgment shall enter as follows:

1. This action is dismissed with prejudice as against defendant Northwestern National Life Insurance Co.

2. The motion of defendants Zurn Industries, Inc. and Zurn Industries, Inc. Health Plan is **GRANTED**.

3. The court declares and adjudges that (1) defendant Zurn Industries, Inc. Health Plan is entitled to recover in full all amounts paid by it for the benefit of Colleen Yunker for care and treatment related

[3] The plaintiffs also argue that the plan language disclaiming any obligation to pay any portion of the insured's attorney fees should be "deemed inapplicable" because the plan breached its fiduciary obligations to its insureds by failing to interpret correctly certain terms of the plan. Trial Memorandum (Docket No. 20) at 17. This argument would be an appropriate part of an action for breach against the plan and its trustees but does not provide a basis for judicial abrogation of an express term of the plan.

to her injuries caused in whole or in part by either or both of the defendants in the action pending in the Maine Superior Court (Cumberland County), Docket No. CV-94-413, from any recovery by the plaintiffs in that action, whether by settlement or judgment, as a first priority; and (2) no reduction is to be made in said recovery for any attorney fees or costs, or any portion thereof, incurred by the plaintiffs in the state court action.

4. The motion of the plaintiffs for judgment in their favor is **DENIED**.

Dated this 28th day of January, 1998.

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David M. Cohen
United States Magistrate Judge